82-984

PETITION

FOR

CERTIORARI

H. R. GIBSON, SR. AND BELVA GIBSON

V.

FEDERAL TRADE COMMISSION

APPENDIX B

OPINION AND ORDER OF

THE

FEDERAL TRADE COMMISSION

APRIL 30, 1980

95 FTC 721-749

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Michael Pertschuk
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of	)
	) Docket No. 9016
HERBERT R. GIBSON, SR.,	)
et al.	)

OPINION OF THE COMMISSION

By Clanton, Commissioner:

The complaint in this case charges respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(a) (1976), and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(c) (1976), stemming principally from the operation of the "Gibson Trade Show", one part from a network of respondent family enterprises. Individual members of the

Gibson family control corporations which own 43 retail discount stores, known as "Gibson Discount Centers"; a family corporation also licenses 614 other stores to operate under the Gibson name.[1] (ID 29). Together, the Gibson-owned and franchised stores combine to buy many of their products from suppliers at a quarterly private fete in Dallas, staged by the Gibson Family, and known as the Gibson Trade Show. (ID 60-61).

Count I of the complaint charges respondents with inducing the payment from suppliers of promotional allowances

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[1]The following abbreviations will be used in this opinion.

ID - Initial Decision Finding number
ID p. - Initial Decision page number
Tr. - Transcript page number
CX - Complaint Counsel's exhibit number
RAB - Appeal brief of Gibson, Sr.
CAB - Complaint Counsel's appeal brief

in connection with the Gibson Trade Show, which allowances were not available on a proportionally equal basis to other customers of these suppliers. This allegation, while maintained under Section 5 of the FTC Act, is patterned after and draws from Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. Count II alleges that respondents, in violation of Section 5 of the FTC Act, collectively boycotted suppliers who did not grant the promotional allowances charged in Count I. Finally, Count III is a distinct allegation of the payment of illegal brokerage in violation of Section 2(c) of the Clayton Act.

Administrative Law Judge Theodor P. von Brand (the "ALJ") dismissed Count I, issued an order against all respondents

except Gibson's, Inc., under Count II, and issued an order only against respondent Herbert R. Gibson, Sr. under Count III. Complaint counsel and respondents both appeal.

Respondent's Businesses

A description of the numerous Gibson corporate entities and the intertwining relationship among them and Gibson family members is set forth at length in the initial decision and will not be repeated here. (ID 1-117).

Briefly, the respondents are Herbert R. Gibson, Sr., ("Gibson, Sr."), individually and doing business as Gibson Products Co. and The Gibson Trade Show; his wife Belva Gibson ("Belva"); two sons, Herbert R. Gibson, Jr. ("Gibson, Jr.") and Gerald Gibson ("Gerald"); and eight corporations, five of which are

Gibson family controlled.[2] Of the remaining three corporations, two[3] negotiated consent settlements in 1976, and one, Al Cohen Associates, Inc., charged solely in Count III, is still in the case.

Gibson, Sr. founded the retail discount store chain and, until November 1, 1972, directed the franchising and trade show aspects of the family enterprise, doing business as the Gibson Products Company. (ID 3-4) Two other Gibson-controlled corporations, Gibson Warehouse, Inc., and Ideal Travel Agency, were used by Gibson, Sr. as vehicles to store and resell merchandise and to

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[2]Gibsons, Inc., Gibson Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Gibson Products Co., Inc.

[3]Progressive Brokerage, Inc. and Barshell, Inc.

collect booth and show fees at The Gibson Trade Show. (ID 14-15).

As of November 1, 1972, a reorganization and change in operating control of various aspects of the family business was effected, essentially through a transfer of stock by Gibson, Sr. and his wife to a corporation, Gibson's, Inc., all of whose shares were owned by two of their sons, Herbert R. Gibson, Jr. and Gerald Gibson. This corporation now owns and operates the franchising and retail aspects of the family business. Gibson, Sr. retained the trade show business and, having sold the Gibson Products Company name to Gibson, Jr. (ID 16, 25), he registered the name, "The Gibson Trade Show", on November 1, 1972. (ID 26).

The Gibson Trade Show, upon which much of this case turns, is a private trade

show where manufacturers display their products to buyers for Gibson owned and franchised stores. (ID 59-61). The show provides the booth space from which the suppliers' representatives can show their wares and attempt to obtain orders.

Gibson, Sr. employs "merchandise managers" or "trade show buyers" to operate the show. These buyers recruit the participation of manufacturers to sell at the show. (ID 78). Buyers discuss product lines, billing terms and prices with suppliers, negotiating to get the best deal on the products to be shown. Upon the satisfactory conclusion of negotiations, a buyer fills in a "show sheet" with the price and terms for each product. These sheets, which are the exclusive order forms used at the shows (ID 90), are headlined "Ship To Gibson

Products Company", followed by blank lines for the address of a particular store. (ID 91). They contain a notation that items are not to be shipped at prices higher than those listed or else a deduction will be taken. (ID 93). The trade show buyers patrol the aisles and booths during the show, talking to suppliers' and retailers' representatives.[4]

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[4]In addition to the provision of booth space, the trade show provides meeting facilities and other services, including the opportunity for placement of "blanket orders," recommendations sent to Gibson stores to purchase particular items. (ID 98).

Suppliers are also solicited to advertise in Gibson tabloids, which are used by Gibson retailers as newspaper supplements or which are mailed out or posted in stores (ID 105). Participating stores purchase the finished tabloids from one of the Gibson family corporations; the tabloids are prepared and printed by G&G Advertising, a proprietorship run by (footnote continued on next page)

Payments made by suppliers, and allegedly illegally induced by respondents, in connection with the trade show included the following, for each year from 1969 through 1972: (1) payment for booth rental, in an amount which was identical for all suppliers; (2) payment for services in connection with booth rental including, but not limited to electrical contractor services and furnishings; (3) payment for provision of personnel to prepare and attend the booth throughout the time The Gibson Trade Show was open; (4) payment for advertising in a Gibson

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(footnote 4 continued)
Gerald Gibson. (ID 107). Also, Gibson, Sr. at times sends letters to suppliers requesting that they advertise in particular tabloids. (ID 113-115). If an item is to be advertised in a tabloid, there is a sign on its suppliers' booth at The Gibson Trade Show which states "Recommended tab item".

tabloid; (5) special trade show prices on one or more of the suppliers' products offered for sale at The Gibson Trade Show; (6) special billing terms on all sales made at the trade show; (7) special allowances on sales made at the trade show calculated from a previously negotiated percentage of all such sales (the so-called "show fee").

The principal family business, from at least 1969 to November, 1972, from November, 1972 to the date the complaint issued in 1975, and to the present, was the ownership and operation of Gibson retail discount stores and the franchising of those stores. Both before and after the November, 1972 transfer, the franchise agreements promised the franchisee the benefit of Gibson volume purchasing and the advice on merchandise, but reserved to the franchisor the right

to order the discontinuance of an item or service if the quality was disapproved.

Participation in the Gibson Trade Show is a standard vehicle for manufacturers wishing to sell to Gibson retail stores. Few other retailers stage private trade shows, however, and accordingly, the complaint charges that the myriad payments made to the Gibson enterprises were not matched by similar payments or terms to the suppliers' other customers.

No additional facts are pertinent to Count I of the complaint; additional information needed to dispose of Counts II and III is set forth infra.

Count I

Count I of the complaint largely tracks the language of the Clayton Act

§§2(d) and 2(e)[5], as amended, and alleges that the Gibson family and corporate

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[5]Section 2(d), 15 U.S.C. §13(d) (1976), provides:

> "That is shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Section 2(e), 15 U.S.C. §13(e) (1976), provides:

> "That it shall be unlawful for any person to discriminate in favor of one purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing of, any services or facilities connected with the processing, handling, sale, or offering

(footnote continued on next page)

respondents knowingly induced and/or received promotional payments and services in connection with the sale of products to Gibson owned and franchised stores in violation of Section 5 of the FTC Act.[6] The seven types of allegedly illegal allowances are those set forth *supra*.

The ALJ found that the variety of fees and special terms given by manufacturers to respondents were not within the purview

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(footnote 5 continued)
for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[6]Although buyer misconduct is not a violation of Sections 2(d) and 2(e), this omission appears to be only a matter of congressional inadvertence. *See* Grand Union Co. v. FTC, 300 F.2d 92, 96 (2d Cir. 1962). Nevertheless, such misconduct is cognizable under Section 5 of the FTC Act. R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964).

of Sections 2(d) and 2(e), because they were in connection with original sale of a product, rather than in connection with its resale.[7] In his view, the allegations of Count I should have been brought under Section 2(a) for price discrimination. Complaint counsel, relying principally on Alterman Foods, Inc., 82 F.T.C. 298 (1973), aff'd, 497 F.2d 993 (5th Cir. 1974), which was distinguished by the ALJ, appeal.[8]

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[7]The ALJ found that the solicitation of fees for tabloid advertising was within the purview of Section 2(d). (ID 184). However, he held that complaint counsel had not sustained their burden of showing contemporaneous sales with respect to the items promoted in the tabloids (ID 189), and complaint counsel did not appeal from this holding.

[8]Complaint counsel have appealed from other holdings of the ALJ on this count of the complaint, but in light of our disposition of this threshold question, we do not reach these other issues.

Two features differentiate Sections 2(d) and 2(e) from the provisions of Section 2(a). The first is that the seller must either provide "services or facilities" or make payment in consideration of "services or facilities furnished by or through [the] customer." It has been held that the service or payment at issue must be promotional in nature, such as for advertising. _See_, _P. Lorillard Co. v. FTC_, 267 F.2d 439, 443 (3d Cir.), _cert. denied_, 361 U.S. 923 (1959). The second is that the payment made or service rendered must be in connection with the "processing, handling, sale, or offering for sale" of a product by the customer, _i.e._, it must bear a nexus to the resale or preparation for resale by the retailer. _See_, _Rutledge v. Electric Hose & Rubber Co._, 511 F.2d 668, 678

(9th Cir. 1975). If these conditions can be met, the plaintiff may take advantage of Sections 2(d) and 2(e), which carry an easier standard of proof than does Section 2(a). Under Section 2(a), price discrimination is lawful, unless it may susbstantially lessen or injure competition and, _inter alia_, it is neither cost-justified, nor undertaken to meet competition. Sections 2(d) and 2(e) require no showing of competitive effect, nor do they allow resort to Section 2(a) statutory defenses, save perhaps the "meeting competition" defense. _See_ E. Kintner, A Robinson-Patman Primer 270-72 (2d ed. 1979); _Exquisite Form Brassiere, Inc., v. FTC_, 301 F.2d 499 (D.C. Cir. 1961), _cert. denied_, 369 U.S. 888 (1962); _but see Henry Rosenfeld, Inc._, 52 F.T.C. 1535 (1956). Thus, Sections 2(d) and

2(e) "create a legal premium for the FTC or other plaintiffs to ease their evidentiary burdens." F. Rowe, Price Discrimination Under the Robinson-Patman Act 372 (1964).

The traditional use of Sections 2(d) and 2(e) has been in the realm of cooperative promotional arrangements. See, FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968). In the classic Section 2(d) and 2(e) case, a manufacturer has compensated a high volume retailer via a discriminatory plan, sometimes in an amount far in excess of that retailer's actual promotional costs, and in so doing has utilized a scheme not realistically available to small retailers. In addition, the manufacturer often rebates a "promotional allowance" to a retailer in an amount tied to the number of units resold by the

retailer to the public, but not linked to the retailer's actual promotional expenditures. Plainly, such a transaction is in connection with a resale and within the ambit of Sections 2(d) and 2(e). Similarly, making employees available or arranging with a third party to furnish personnel for purposes of performing work for a customer would also come within Sections 2(d) and 2(e). FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. §240.7, example 6 (1980).

Because of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed. Accordingly, we will generally

find that Sections 2(d) and 2(e) apply to cooperative promotional arrangements. _See_ Rowe, _supra_ at 381 ("[T]he legal criteria of Sections 2(d) and 2(e), unless confined to the sphere of cooperative promotional arrangements, would cut across and confound the legal requirements of the separate price and brokerage provisions of the Act.")

The legislative history of Sections 2(d) and 2(e) evidences the relatively narrow scope that Congress intended these specific provisions to have. For example, Representative Utterback, Chairman of the Senate-House Conferees, stated that:

> "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to

> the customer so favored as compared with others who have to bear the cost of such services themselves." 80 Cong. Rec. 9418 (1936).

And the Senate and House Judiciary Committee Reports also focus on "special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally." S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936).

In keeping with this narrow scope courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a). Variations in credit terms

have consistently been held to present only a Section 2(a) issue, and courts have refused to allow such claims to be maintained under Sections 2(d) and 2(e). See, e.g., Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F Sup. 4, 8 (E.D. Pa. 1977); Glowacki v. Borden, Inc., 429 F. Supp. 348, 353 (N.D. Ill. 1976). Likewise, discriminatory freight allowances have been held to be in connection with delivery on the original sale and as such within Section 2(a) rather than Sections 2(d) or 2(e), see Chigaco Spring Products Co. v. United States Steel Corp., 371 F.2d 428 (7th Cir. 1966), and other so-called delivery allowances have been held not to be in connection with resale and so to state a Section 2(a) rather than a Section 2(d) claim, Glowacki, supra at 358-59.

Furthermore, courts have recognized that the purpose of Sections 2(d) and 2(e) is to strengthen Section 2(a) by prohibiting outright hard-to-detect, disguised discrimination in the form of promotional allowances, thus forcing most discrimination into the open area of price allowances or discounts, where it can be measured and adjudicated under Section 2(a). FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 68 (1959). In light of its salutary, but narrow, statutory purpose, the courts have, albeit not unanimously, resisted expanding the "scope of Sections 2(d) and 2(e) beyond the limited area of applicability intended by Congress," Cecil Corley Motor Co., Inc. v. General Motors Corp., 380 F. Supp. 819, 850 (M.D. Tenn. 1974); and see generally Skinner v. Unites States Steel

Corp., 233 F.2d 762 (5th Cir. 1956); New Amsterdam Cheese Corp. v. Kraftco Corp., 363 F. Supp. 135 (S.D.N.Y. 1973); David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

There is some authority, however, for expanding the scope of Section 2(e). Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972), cited by complaint counsel, held that preferential differences in the timeliness of delivery were within the purview of Section 2(e) because consistently faster deliveries would ultimately promote and facilitate resale. The very limited acceptance of this decision, see Glowacki v. Borden, supra at 356; Harlem River Consumers Cooperative, Inc. v. Associated

Grocers of Harlem, Inc., 371 F Supp. 701, 710 (S.D.N.Y.), aff'd, 493 F.2d 1352 (2d Cir. 1974) (dicta); Palmer News, Inc. v. ARA Services, Inc., 476 F. Supp. 1176, 1183 (D. Kan. 1979) (dicta), is outweighed by the strenuous criticism of its expansive view, see Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 98, 108-09 (1972); Cecil Corley Motor Co., Inc., supra at 851-852, and other courts have either rejected, id.; Buchannan v. Yamaha International Corp., 1977-1 Trade Cas. (CCH) ¶61,245 at 70,728-29 (D. Ore. 1976), or distinguished the decision, David R. McGeorge Car Co., supra at 55; Purdy Mobile Homes, Inc. v. Champion Home Builders Co., 594 F.2d 1313, 1317-18 (9th Cir. 1979). Indeed, it is not entirely clear whether the Seventh Circuit continues to hold firmly to its Centex-Winston

decision. See Kirby v. P. R. Mallory & Co., Inc., 489 F.2d 904, 910 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974); Harper Plastics, Inc. v. Amoco Chemicals Corp., [1980] 5 Trade Reg. Rep. (CCH) ¶63,229 at 78,126-27 (7th Cir. March 17, 1980); but cf. Glowacki, supra at 356. In Kirby, which dealt with advertising allowances, the court reaffirmed the accepted distinction between payments and services in connection with the original sale, which are challengeable only under Section 2(a), and those with a connection to the resale, which are cognizable under Sections 2(d) or 2(e). The court then concluded:

> "In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price

discrimination in the supplier-customer sale and drafted §§2(d) and 2(e) to apply exclusively to promotional discriminations like those alleged in this case." 489 F.2d at 910-11

Whatever vitality remains in the Centex-Winston decision, it does not contravene the general standards which we bring to bear upon the facts of this case.

Against this legal background, we approach our earlier decision in Alterman Foods, Inc., supra. Unlike the ALJ, we are unable to discern a principled basis upon which to distinguish that case from the one at bar. In a factual setting quite similar to the instant case, Alterman held that discriminatory payments to a private trade show were, in fact, unlawful promotional allowances under Sections 2(d) and 2(e) of the Clayton Act. In finding that the Alterman food

show had induced suppliers to violate Sections 2(d) and 2(e), the Commission relied upon two kinds of benefits which had accrued to the Alterman retail operation. These benefits were described as "[d]irect in the sense that profits from booth rentals enhanced the financial position of the respondent, and indirect in the sense that the suppliers' booths, displays and demonstrations at the food show were intended to aid in and promote the product's resale to the consuming public." 82 F.T.C. at 343.

After careful reexamination of our decision in Alterman, we conclude that its reasoning is flawed and, henceforth, we decline to follow it. Specifically, we do not judge the "benefits" recited in Alterman, which are relied upon by complaint counsel, to be sufficiently related

to the promotional allowance and resale requirements of Sections 2(d) and 2(e) to trigger application of those provisions.

Undoubtedly, the products purchased by Gibson retail buyers from manufacturers at the trade show were intended for resale to the ultimate consumer. But this fact standing alone is insufficient to transform what is plainly the original sale into one that is in connection with resale. To the extent that Gibson entities received booth rentals and Gibson buyers received price concessions not available to the competing customers, an action may lie under Section 2(a). But to focus on the translation of these "direct benefits" down to the next level of competition, i.e., to rely on financial strength of the company, enabling Gibson retailers to undercut competitors

on subsequent resales, is to misapply the statute.[9] "Benefits" of this sort are inherent in any transaction in which goods are ultimately destined for resale, and to accept the *Alterman* holding would mean opening up Sections 2(d) and 2(e) to practices that Congress intended to be challenged solely under Section 2(a).[10]

9Of course, an examination of such direct benefits *ab initio* may be necessary to determine whether there has been discrimination among competing customers. *See* Kintner, *supra* at 254. But even if we assume for purposes of this discussion that all seven categories of alleged discriminatory payments, including the show fees, inured somehow to the benefit of the Gibson retailers, that does not automatically bring such payments within the purview of Sections 2(d) or 2(e). Although it is not entirely clear, it appears that the Commission in *Alterman* analyzed the direct benefits in terms of both the discrimination and resale issues.

10Our holding is not inconsistent with R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir 1964), in which Macy's solicited
(footnote continued on next page)

As to the "indirect benefits" identified in Alterman, we believe they play a role too incidental in the overall transaction here to warrant applications of Sections 2(d) and 2(e). In general, marketing assistance, if discriminatorily granted, does run afoul of Sections 2(d)

(footnote 10 continued)
vendors to contribute $1,000 apiece to help defray advertising and promotional costs of its 100th anniversary celebration. While Complaint counsel would read Macy as proscribing the receipt of payments as "general revenue", in fact the court specifically found that Macy's used the contributions for advertising purposes:

> "Macy's used the payments for institutional advertising and promotions to get more people into its stores to buy the goods of all its vendors. The payments by the contributing vendors were thus in consideration for services or facilities furnished by Macy's in connection with the offering for sale of the vendor's goods." Id. at 450.

and 2(e). But in the present case, it is clear that the principal function of the trade show was to funnel a high volume of products from manufacturers to participating retailers at a discount price, and not to provide promotional assistance. While various suppliers may have laid out their merchandise and demonstrated their products as complaint counsel contend (CAB 22), and while suppliers may even have discussed selling techniques with would-be buyers, plainly the suppliers' principal purpose in engaging these acts was to induce retail store buyers to make the original purchases, not to provide marketing or promotional assistance to them.[11] Moreover, no real showing has been made that retailers received

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[11]In Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946), cert. denied,
(footnote continued on next page)

"services or facilities" furnished or underwritten by suppliers beyond completion of the original sale. We do not mean to suggest that trade shows are free of the constraints of Sections 2(d) and 2(e) insofar as they facilitate promotion upon resale, but rather we will look realistically at transactions as a whole before deciding to apply Sections 2(d) and 2(e), the narrower statutory provisions, instead of Section 2(a). In this case, the sundry fees paid by suppliers at the trade show were, at bottom, little

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(footnote 11 continued)
331 U.S. 806 (1947); and Exquisite Form Brassiere, Inc. v. FTC. 301 F.2d 499 (D.C. Cir. 1961), _cert. denied_, 369 U.S. 888 (1962), for _example_, manufacturers' employees were utilized to demonstrate product use to customers at retail outlets. The marketing assistance in the instant case, by contrast, was no more than a tangential element of the transaction.

more than reductions in price necessary to induce Gibson retailers to make the original purchase of the products.

We believe this result comports most closely with the intent of Congress and meaning of the statute. Accordingly, Count I, which rests on too expansive an interpretation of the jurisdictional requisites of Sections 2(d) and 2(e) of the Clayton Act, is dismissed.

Count II

Few manufacturers could resist the subtle persuasion of Herbert R. Gibson, Sr. to participate in the Gibson Trade Show. And, indeed, as Gibson, Sr. would point out, matters had been arranged so that the Gibson Trade Show was a very important vehicle for selling to Gibson retail stores. The trade show afforded suppliers a unique opportunity to exhibit their wares to a multitude of Gibson

retail stores at once. On occasion, however, Gibson, Sr. and would-be trade show participants, such as Toastmaster Division of McGraw Edison Company, would have a disagreement over the sundry fees to be paid by the exhibitor.

Toastmaster had participated in Gibson trade shows from 1966 to 1970, but in 1970 was unable to agree with Gibson buyers on terms for its future participation. (ID 379, 384-86). On January 22, 1971, a letter was sent out to "All Stores" by two buyers from the Gibson Products Company, Tommy Perkins and Bobby Regeon, concerning Toastmaster. (CX 104). It read:

> "The above company will sell us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or

> authorize this line, and suggest that you discontinue the same.
>
> Please give this your attention, and we appreciate your continued co-operation."

Similar letters, signed by Tommy Perkins, were sent out on March 11, 1971 and March 30, 1971 concerning Tucker Manufacturing Co. and Jeannette Glass Co., respectively. (CX 303, CX 136). There was evidence as well of other direct and indirect communications to Gibson-owned and franchised stores suggesting they not purchase from designated suppliers.

Toastmaster sales to Gibson-owned and franchised stores, which had amounted to $953,656 in 1970, plummetted to $269,778 in 1971. (ID 390). Tucker and Jeannette sales also fell sharply following the Perkins letters. (ID 398-99, 408).

Despite efforts by Toastmaster representatives to sell directly to individual Gibson franchised stores, sales remained depressed for two additional years. In 1974, Toastmaster met with Gibson, Sr.'s terms for participation in the trade show, and its sales to Gibson stores went up. (ID 392).

The ALJ found that the Gibson family respondents and the Gibson corporate respondents, in combination with some or all of the Gibson family owned stores and Gibson franchised stores, had maintained an illegal boycott of suppliers who would not grant the special allowances demanded on sales during or incident to the trade show. He found that respondents had induced Gibson franchised stores to stop buying from specified suppliers in order to coerce those suppliers into paying

increased show fees to Gibson, Sr. for participation in the trade show. All Gibson family respondents were placed under order, as they were officers and directors of Gibson Products Company (ID 9), the name under which the trade show operated until November 1, 1972.[12] The order also binds all Gibson corporate respondents, save Gibson's, Inc., which was not in existence when the boycott began. Inclusion of these respondents was premised on the ALJ's finding of mutual interdependence and integrated operation among all Gibson corporate and family respondents.

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[12]Belva Gibson appeals from inclusion in the boycott finding and order, claiming she did not actively participate in the boycott. In light of the fact that Belva Gibson was an officer and director of the Gibson corporate respondents, except for Gibsons, Inc., we find that she was properly included in the order.

Respondents appeal, contending that the evidence is insufficient to sustain a finding that there was a boycott. Respondents argue that there is no evidence that specific retailers ceased buying Toastmaster products because of the January 22, 1971 letter; that it was improper for the ALJ to find a drop in Toastmaster sales from 1970 to 1971; and, finally, that it was improper for the ALJ to infer a boycott from the drop in sales. Complaint counsel appeal from the ALJ's refusal to include Gibson's, Inc. in the order. For the reasons discussed below, we agree with complaint counsel.

Group boycotts generally are *per se* violations of the antitrust laws. "[C]ertain agreements or practices ... because of the pernicious effect on competition and lack of any redeeming virtue

are conclusively presumed to be unreasonable and therefore illegal ... [G]roup boycotts are of this character." United States v. General Motors, 384 U.S. 127, 146 (1966).[13]

The rule of per se illegality has been applied to three types of group boycotts: (1) horizontal combinations of traders at

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[13]We are not unaware of decisions applying the rule of reason to conduct that was alleged to be a "boycott", see, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). But the considerable differences between the conduct in those cases and conduct traditionally proscribed under a per se standard suggests that there may be no real inconsistency in approach. See Sullivan, Handbook of the Law of Antitrust 256-59 (1977). In any event, the facts of the instant case fall well within existing per se decisional law, and hence we have no occasion to explore the precise dividing line between per se illegal boycotts and arrangements that should be examined under the rule of reason. See generally St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 542-43 (1978).

one level of distribution, the purpose of which is to exclude direct competitors from the market; (2) vertical combinations of traders at different marketing levels, the purpose of which is to exclude competitors of some members of the combination; and (3) combinations "designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973). See also United States v. General Motors Corp., supra; Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457 (1941); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 127 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974).

The conduct at issue here plainly falls within the third category noted above. The boycott victims all refused to pay or increase the percentage paid to Gibson, Sr. as a show fee for participation in the Gibson Trade Show. In order to induce these firms to pay the demanded amount, Gibson Products Co. requested Gibson owned and franchised stores to stop buying their products, thus denying them access to the Gibson market. This action manifests both exclusionary and coercive conduct, thereby exhibiting rather clear anticompetitive effects. And respondents' utilization of their status as franchisor to Gibson stores for the purpose of coercing firms to participate in the trade shows at a price they were unwilling or unable to pay admits of no redeeming virtue.

Respondents' appeal, premised almost exclusively on factual grounds, is unpersuasive. The letters to Gibson stores were plainly invitations to boycott.[14] On their face, these letters went significantly further than the communications in Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600 (1914), the circulation of which was to be a violation of §1 of the Sherman Act. The Eastern States letters contained no request to refrain from dealing, but merely set out the names and addresses

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[14]The ALJ found that respondents' testimony that the letter regarding Toastmaster was sent out only to those stores which had already complained about Toastmaster products was not credible, and we agree. The record compels the finding that "All Stores" meant just that, and that the letter was received, or intended to be received, by all stores operating under the Gibson name, both franchised and family-owned.

of wholesalers who also sold at retail. The Supreme Court found, in light of the record in that case, that the circulation of such information had the "natural effect of causing such retailers to withhold their patronage from the concern listed." 234 U.S. at 609. And the letters in this case contained the very suggestion of incitement and mutual action that was found lacking in the case relied upon by respondents, Modern Home Institute v. Hartford Accident & Indemnity Co., 513 F.2d 102, 112 (2d Cir. 1975).

Neither does the fact that there was no express mutual agreement to boycott vitiate the finding of a collective refusal to deal. See Eastern States, supra at 608-609. It is sufficient that knowing concerted action was contemplated and invited, the stores adhered to the

request.[15] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939); FTC v. Cement Institute, 333 U.S. 683, 716 n.17 (1948). All stores which received the letter are chargeable with knowledge that concerted action was at least contemplated, see Interstate Circuit, supra at 222, and it is evident from sales data and corroborative testimony that a very substantial number of stores did participate in the scheme.

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[15]The fact that the letters were sent out on Gibson Products Company stationery, the name under which Gibson, Sr. granted the stores their franchises, itself suggests the presence of considerable inducement to the franchisees to comply. Roy Love, a franchisee in Oklahoma City, clearly had this is mind when he told Toastmaster's representative, after receiving his copy of the letter, that "if he wanted to keep his sign out in front of his store, saying 'Gibson's', he had to go by what Seagoville [Gibson management] ordered or told him to do." (Tr. 3466)

Each of the four documents in this exhibit contains two charts. The first is labeled "Monthly Dollars", the second "Cumulative Dollars". On both charts each row is labeled with a month and each of the first eleven columns is labeled with a product. The twelfth column is labeled "other appliances" and the last column is labeled "total". It is equally clear that each figure in the "Total" column of the Cumulative Dollars chart represents the cumulative total of all products sold in the preceeding months. Consequently, the last figure in the "Total" column of the chart represents the sale of all products through December, or the total for that year. Respondents have advances no alternative interpretation of this figure, and indeed, the chart will support none. We

thus find respondents' argument in this respect to be utterly without merit.

Respondents, citing the general rule against admissibility of hearsay, also object to reliance on testimony and memoranda by Toastmaster representatives who recalled being told by Gibson franchisees that, essentially, they were under boycott. (See Tr. 3464-66, CX 106A). Hearsay evidence is admissible, however, in FTC adjudicative proceedings, provided that it meets the standard set out in our Rules of Practice §3.43(b), viz., that it be "relevant, material, and reliable." Resort Car Rental System, Inc. v. FTC, 518 F.2d 962, 963 (9th Cir.), cert. denied, 423 U.S. 827 (1975). In this case, the proffered evidence is consistent with and corroborative of other facts in the record. While we would attach less weight to hearsay

evidence standing alone, under the circumstances presented here we see no reason to exclude it or ignore it.

Respondents' final argument is that even if Toastmaster sales to Gibson stores did drop, the decline was more likely attributable to factors other than the boycott, _viz._, dissatisfaction with Toastmaster products, an asserted preference by Toastmaster's representatives to sell to distributors instead of directly to retailers, and Toastmaster's lack of access to Gibson retailers because of its non-participation in the Gibson Trade Show.[16]

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[16]Respondents Gibson, Jr. and Gerald also contend that retail stores in which they were financially interested did not participate in the boycott. These respondents have offered little evidence to rebut this respect, however. In any event, since responsibility for sending (footnote continued on next page)

We agree that an inference of conspiracy should not be drawn where other inferences are equally plausible, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280 (1968), but respondents clearly fail to make this showing.

Although respondents offered testimony on complaints received about Toastmaster's shipping policies at Christmas time (Tr. 6639), there was no evidence that any store stopped buying Toastmaster goods due to these problems, nor did the witnesses themselves suggest that this was the case. Furthermore, respondents' claim that dissatisfaction with Toastmaster's warranty program contributed to the

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(footnote 16 continued)
the boycott invitations may be attributed to these respondents, the question of their stores' acceptance of their invitations is essentially immaterial.

decline in sales is supported only by the testimony of one witness, who stated that such dissatisfaction caused him to discontinue the Toastmaster line sometime in the mid-1960's. (Tr. 7893-94). No evidence is offered that this caused any store to discontinue buying Toastmaster goods in 1970-1971. The additional claim that Toastmaster's failure to live up to its commitments caused the decline is supported only by testimony from the witness who claimed he stopped buying this line of goods during a period of time when he was not working for any Gibson discount store but for another store altogether (Tr. 7938-39). All of this evidence fails to establish that any Gibson store stopped buying Toastmaster products in the relevant period for any of the suggested reasons.

The second explanation offered, that Toastmaster's representative preferred selling to distributors, and that he did not want to increase his sales to Gibson stores (Tr. 3507-08), also fails to find support in the record. No evidence was offered to establish a decision on that representative's part to stop selling to Gibson stores. Nor could it be inferred that because he did not wish to increase sales that he, therefore, wished to decrease them. By contrast, his own testimony indicates that he continued to try to sell to individual Gibson stores, even after the January 22, 1971 letter. (Tr. 3464-65).

The last alternative explanation, which cites Toastmaster's non-participation in the trade show as the cause of its decline in sales, is rather ironic, since

it was Toastmaster's refusal to accept Gibson, Sr.'s demand for increased trade show participation fees which led to its being blacklisted in the first place. Even if we were to dignify this argument by full consideration of it, however, we would have to conclude that it is not adequately supported by the record. Respondents proffered no direct evidence of the impact, in the absence of a boycott, that non-participation in the trade show would have on a firm's ability to sell directly to individual Gibson stores. Without any indication of the magnitude of this impact, we cannot infer that non-participation in the trade show alone could have caused such a sharp drop in Toastmaster sales in 1971.

Respondents have failed to establish the existence of legitimate business

reasons on the part of Gibson retailers, wholly distinct from their receipt of the boycott letter, which would account for the sharp drop in Toastmaster sales. Cf., DuPont Glore Forgan, Inc. v. American Telephone & Telegraph Co., 437 F. Supp. 1104, 1126 (S.D.N.Y. 1977), aff'd mem., 578 F.2d 1367 (2d Cir.), cert. denied, 439 U.S. 970 (1978). Neither are we persuaded that this drop in Toastmaster sales was "mere chance." Interstate Circuit, supra at 223. Respondents' actions and their consequences cannot be explained by alternate inferences that can be drawn from the record, and in light of the specific invitation to boycott and the subsequent evidence as to the effects of the invitation, we find that respondents have violated Section 5 of the FTC Act by engaging in an unfair method of competition,

viz., a group boycott.[17] We find further that, despite a modest rebound in Toastmaster sales to individual Gibson stores in 1972 and 1973, this boycott plainly continued until at least 1974 when Toastmaster capitulated to the demands of Gibson, Sr.'s representatives for higher fees for participation in the Gibson Trade Show. (ID 392). We note also that Respondents have offered no evidence to show that the boycott was discontinued prior to 1974.

The ALJ, finding that the individual and corporate Gibson respondents comprised a single entity, issued an order on this count of the complaint binding all of them,

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[17]Indeed, under these circumstances an invitation to boycott, irrespective of its actual effects, might violate Section 5 if the soliciting party has a reasonable expectation that the invitation will be accepted and acted upon.

save Gibson's, Inc. Without necessarily agreeing that there was complete unanimity of interest among all respondents under the pre-November 1, 1972 organizational structure of the Gibson family business, we conclude that the ALJ was correct in placing all such respondents under order.

First, substantial commonality of interest was demonstrated, especially in the pre-November 1, 1972, environment. The ALJ found that all individual respondents, including Gibson, Jr. and Gerald, were officers of Gibson Products Company, the franchisor corporation, with authority broad enough to include knowledge and approval of the dissemination of the boycott letters. Inclusion of the corporate respondents was correctly premised on the ALJ's finding of their mutual interdependence and on the interdependence

among the corporate and individual respondents collectively. It is not necessary for this purpose to determine, as the ALJ did, that all respondents were part of a single enterprise in the pre-November 1, 1972 period.

Second, respondents' operations are sufficiently integrated that an order embracing all of them is necessary to insure the effectiveness of the relief we have directed. Some fencing in to prevent circumvention of Commission orders is appropriate and lawful, see Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973); Delaware Watch Co., Inc. v. FTC, 332 F.2d 745 (2d Cir. 1964), and where, as here, it has been shown that respondents' operations

are closely integrated, it is probably indispensable.[18]

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[18]Respondents object also to the entry of an order against the lot of them precisely because they are so closely interwoven, on the ground that corporations cannot conspire with their own subsidiaries, affiliates, or officers. Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D. Cal. 1974), _modified_, 401 F. Supp. 1374 (N.D. Cal. 1975), _modified_, 548 F.2d 795 (9th Cir. 1976), _cert. denied_, 433 U.S. 910 (1977). It is contended, for example, that Gibson, Sr., and his wife could not have conspired with the corporate respondents because they owned a controlling interest in each. Without discussing the permutations of who amongst the Gibson corporate and family respondents could be held to have conspired with whom, we simply note that concerted action between related corporations which has the purpose of effect of unreasonably restraining the trade of unrelated third parties is highly suspect under the intra-enterprise conspiracy doctrine. _See, e.g._, American Bar Association, Antitrust Law Developments 33 (1975), and cases cited therein. Moreover, we have made appropriate provision in Part I of the Final Order for those circumstances in which some of the respondents collectively own retail stores.

(footnote continued on next page)

Complaint counsel appeal from the failure to include Gibson's, Inc., the principal post-November 1, 1972, corporate entity, in the boycott provisions of the order. The ALJ reasoned that since Gibson's, Inc., did not exist at the time of the boycott, it should not be covered (ID 210). We disagree.

The evidence indicates and we have found that the boycott of Toastmaster continued until at least 1974, and indeed,

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(footnote 18 continued)
We have no occasion here to examine the outer reaches of intra-firm conspiracy doctrine in any event, principally because the conspiracy we have found relates mainly to the agreement between the respondents (and each of them) and the Gibson franchised stores to boycott designated suppliers' product lines. Also, of course, the corporate respondents were all held because their interdependence required doing so in order to insure the effectiveness of the relief ordered, and "bathtub conspiracy" doctrine does not address this question at all.

complaint counsel contend that Jeannette is still being boycotted. (RAB 31). Since institutional management of the Toastmaster boycott, at least in the post-November 1, 1972 period, was in the hands of Gibson's, Inc., which became the franchisor corporation, or of its officials, we find that that corporation participated substantially in the conspiracy, and is chargeable as a member thereof.

Indeed, even if the boycott had not continued after November 1, 1972, it would still be necessary and proper to include Gibson's, Inc. in the order. Where a business found guilty of unfair trade practices is continued by a subsequently formed corporation, both businesses may be subject to the cease and desist order, _P. F. Collier & Son Corp. v. FTC_, 427 F.2d 261 (6th Cir.), _cert._

denied, 400 U.S. 926 (1970). The determination to include the newly formed company hinges on various factors which include whether both companies engaged in the same business, the capability of the new company to resume the unfair practices, and whether there is substantial identity of ownership between the old company and the new, id. at 272. Prior to November 1, 1972, the franchising business and the Gibson Trade Show were operated by Gibson, Sr. under the aegis of Gibson Products Co. Gibson, Jr. and Gerald Gibson were president and executive vice president of that company. Currently, Gibson, Sr. operates the trade show and Gibson, Jr. and Gerald carry on the franchising business through Gibson's, Inc. Clearly the same parties found to have engaged in the boycott are

still in control of the same businesses which were involved in the boycott. In light of the integrated nature of the business operations prior to November 1, 972, the fact that the Gibson Trade Show continued to be oriented to Gibson stores, and the existing family relationship, the division of labor represented by the franchising business being taken over by the newly formed Gibson's, Inc. does not justify excluding that corporation from the order. Thus, the order will run to this corporation as well.

Count III

Complaint counsel challenge under Section 2(c) of the Clayton Act[19] the

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[19]Section 2(c), 15 U.S.C. §13(c) (1976), provides:

> "That is shall be unlawful for any person engaged in commerce,

(footnote continued on next page)

receipt of commissions by Gibson, Sr., from two brokers representing Ray-O-Vac Company, Barshell, Inc., and Al Cohen Associates, Inc. The statute bans payments of brokerage or allowances in lieu thereof by one party in a transaction to the other and by either party to the other's agent. Complaint counsel tried

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(footnote 19 continued)
to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

the Count III charges on the theory that Gibson, Sr. acted in these transactions as a principal or buyer, not on the theory that he acted as intermediary or agent of other respondents or nonrespondent franchisees.

The ALJ found that Gibson, Sr. (but none of the other Gibson family respondents) had violated Section 2(c) by splitting brokerage fees with Barshell.[20] (ID 198). At least one payment by Barshell to Gibson, Sr. of a part of its

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[20]Gibson, Sr. argues that the specific violation found by the ALJ was not alleged in the complaint. (RAB 8). We find, however, that respondent had ample notice of what complaint counsel intended to prove, that he had adequate opportunity to defend against the charges, and that he, in fact, took advantage of this opportunity. See, inter alia, Complaint Counsel's Answer to Motions to Exclude Evidence, and Respondent's Reply to Answer to Motions to Exclude Evidence, each filed December 2, 1977.

commissions from Ray-O-Vac was made in September, 1972, while Gibson, Sr. was owner and operator of various Gibson retail stores, and, thus, while he was clearly a "buyer". As a consequence, an order was entered against Gibson, Sr.

With respect to the charge of splitting commissions with Al Cohen Associates, the ALJ found that while substantial payments to Gibson, Sr. had been made by Al Cohen in 1974 and 1975, Gibson, Sr. was not a "buyer" at the time, because he no longer had an ownership interest in any retail operation. The law judge, therefore, found that Section 2(c) had not been violated and dismissed the complaint against Al Cohen and Associates. (ID 198).

Both sides appeal, and we will consider each of the issues raised _seriatum_.

First, Gibson, Sr., relying on *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974), contends that the "in commerce" requirement of Section 2(c) has not been met. (RAB 19-22) We disagree.

The question answered in the negative by the Supreme Court in *Copp* was "whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation 'in commerce' within the meaning of each of these sections [§2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and §3 and 7 of the Clayton Act] and whether such sales are 'in commerce' and 'in the course of such commerce' within the meaning of §2(a) and 3 respectively." *Id.* at 188. There was no argument in *Copp* that sales were, in fact, made interstate commerce or were

otherwise directly involved in national markets. Rather, Copp argued only that the "in commerce" requirement was satisfied because the asphaltic concrete was used in construction of interstate highways. Id. at 198.

By contrast, the brokerage payments made in this case were allowances upon all Ray-O-Vac sales to Gibson retail stores, both family owned and franchised, in a 20-state area. (ID 194). Thus, not only could one find an "ample nexus to interstate commerce in the whole transaction," Shreveport Macaroni Manufacturing Co. v. FTC, 321 F.2d 404, 409 (5th Cir. 1963), cert. denied, 375 U.S. 971 (1964), as the ALJ did, but the underlying sales were, in fact, directly interstate commerce, making this a straightforward case.

Respondent's other threshold argument is that a showing of discrimination is a necessary prerequisite to a finding of a Section 2(c) violation. (RAB 22-25). Once again, we disagree.

The proscription of Section 2(c) is absolute in prohibiting the payment of brokerage to the other party to a transaction or to that party's agent, "except for services rendered." The legislative history[21] and the case law support this understanding. Such doubt as exists in

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[21]The Conference Report states:

> "[T]his subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller

(footnote continued on next page)

this area was created by dicta in the decision of the Supreme Court in _FTC v. Broch & Co._, 363 U.S. 166 (1960).[22] While _Broch_ may have generated some confusion, _see_ Rowe _supra_ at 344-45, the weight of authority is that a showing of discrimination in the payment of "dummy brokerage" is not a generic statutory requirement.

(footnote 21 continued)

> direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."
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> H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936).

[22]Respondent's argument is not based on a specific holding in _Broch_, but only upon the Court's _occasional references_, in the context of the facts of that case, to "discriminatory" brokerage.

In Broch an independent broker agreed to lower his commission in order to give a purchaser a lower price. The issue was whether the lower price that the buyer obtained was an allowance in lieu of brokerage in violation of Section 2(c). The Supreme Court found a violation, reasoning that this situation was analogous to a broker splitting part of his commission with buyer. The Court was concerned, however, that brokers be able to change their prices without every consequent saving to a buyer being judged an "allowance in lieu of brokerage." Thus, the Court wrote, "[t]his is not to say that every reduction in price coupled with a reduction in brokerage, automatically compels the conclusion that an allowance in lieu of brokerage has been granted." 363 U.S. at 175. The Court went on to explain

that "[a] price reduction based upon alleged savings when given only to favored customers." _Id._ at 176. The Court's language that "whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case," _id._, cannot fairly be read to require a showing of discrimination as a prerequisite to finding any Section 2(c) violation.

Read as a whole, _Broch_ represents an effort by the Court to plug a possible statutory loophole through use of the "allowance in lieu of brokerage" provision. Because of difficulties peculiar to transactions of the type considered in _Broch_, it was necessary to use the notion of discrimination as an element in establishing whether a price reduction was an allowance in lieu of brokerage.

The instant case is quite different, however. Here it is alleged that the seller made payments to a broker who, in fact, was under the control of the buyer and who passed on most of his commissions to that buyer.[23] Broch reviews the legislative history of Section 2(c), finding:

> "One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This

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[23] The ALJ found that "Gibson, Sr.'s review of Ray-O-Vac's commission statements to Miller, ostensibly a seller's broker, to determine how much brokerage he should receive, demonstrates respondent's control of the latter." (ID 197).

practice was one of the chief targets of §2(c) of the Act."

363 U.S. at 169.

Thus, the type of transaction we consider here is precisely that which it was the major legislative purpose to curtail. While respondent quotes a great length from such cases as Shreveport Macaroni Manufacturing Co. v. FTC, supra; Gulf Oil Corp. v. Copp Paving Co., Inc., supra; and Roher v. Sears, Roebuck & Co., 1975-1 Trade Cas. ¶60,352 (E.D. Mich. 1975), for the proposition that Section 2(c) is directed at discrimination, none of these cases is factually apposite and none demonstrates that, in general, discrimination is a necessary element of a Section 2(c) violation.

As a matter of statutory construction of Section 2 as a whole, subsection 2(c),

like subsections 2(d) and 2(e), necessarily makes certain business practices, other than price discrimination, unlawful, as it is designed to eliminate hidden preferences by forcing them "into the open" for measurement and adjudication under the more forgiving price discrimination provisions. _FTC v. Simplicity Pattern Co._, 360 U.S. 55, 68 (1959).[24] Moreover, subsections 2(d) and 2(e) on their face require a showing of discrimination, while subsection 2(c) does not, thus manifesting an explicit congressional determination not to require discrimination as a precondition to finding illegal dummy brokerage. Given

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[24]The Court in FTC v. Simplicity Pattern Co. noted expressly that each of subsections (c), (d), and (e) makes certain practices other than price discrimination unlawful. 360 U.S. at 65.

the purpose and structure of the Act and the illogic of addressing the problem of dummy brokerage in terms of discrimination, a general requirement that discrimination be shown cannot and should not be read into Section 2(c).

Complaint counsel cites _Rangen, Inc. v. Sterling Nelson & Sons_, 351 F.2d 851 (9th Cir. 1965), _cert. denied_, 383 U.S. 936 (1966), for the proposition that _Broch_ is not to be understood to require generically a showing of discrimination, and we find the discussion in that case convincing. In _Rangen_ it was concluded that Section 2(c) applies to payment of commercial bribery and that discrimination is not a necessary element of a Section 2(c) violation.

The Court explained that:

> "... discrimination was used in Broch to determine if the price arrangement was an "in lieu" of brokerage transaction' and, although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage."
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> 351 F.2d at 858

Respondent cites no decisions other than Broch-type cases involving allowances in lieu of brokerage in which a Section 2(c) case was dismissed for failure to show discrimination. We, therefore, conclude that Section 2(c) means, in essence, what it says, and that complaint counsel need not demonstrate, as respondent would require, that dummy brokerage has been paid to others, with favored customers receiving larger payments.

Accordingly, the threshold requirements to utilize Section 2(c) have been satisfied in this case.

Respondent next raises certain factual objections to a finding of a Section 2(c) violation. Gibson, Sr. contends that the check that was issued to him on September 23, 1972 (CX 192), which was found by the ALJ to be evidence of the illegal brokerage, was, in fact, an unrelated 3% commission or show fee due Gibson, Sr. for sales by the Gibson Trade Show of merchandise belonging to Barshell. (RAB 13). There is a conflict in the testimony on this point between Barshell's proprietor, Mr. James Miller, and Mr. Lynn Low, a trade show buyer for Gibson, Sr. We resolve the conflict as the ALJ did, by crediting Mr. Miller's testimony.

Mr. Miller testified, in essence, that Gibson, Sr. would review his "commission statements" (which indicated total sales by Ray-O-Vac through Barshell to Gibson stores) and assess a corresponding charge as his brokerage fee upon Mr. Miller's commission. (Tr. 3132-34). Mr. Miller identified the check in question (CX 192), as his payment to Gibson, Sr., for this purpose. Mr. Low contended that CX 192 was Barshell's check in payment for the Gibson Trade Show's sales of Barshell's health and beauty aids. (Tr. 7523-24). There is evidence, however, that Mr. Miller sold health and beauty aids, not through Barshell, but through his other corporation, Progressive Brokerage. (Tr. 3136-37). In fact, Mr. Miller testified that Barshell was formed specifically to be a housewares distributor, "[a]nd

that's why I chose to move it [Ray-O-Vac] into that company [Barshell], as opposed to our beauty aids rep." (Tr. 3145). Had the payments been for the purpose described Mr. Low, therefore, the check presumably would have been made out to Progressive Brokerage, rather than to Barshell. Moreover, Mr. Miller's testimony is consistent with evidence of Gibson, Sr.'s course of dealing, and is specifically consistent with the ALJ's finding that Gibson, Sr. had an agreement with Mr. Miller's successor as agent for Ray-O-Vac to do precisely the same thing. (ID 425-29).

Gibson, Sr. next contends that he was not a buyer in September, 1972, and thus, cannot be liable under complaint counsel's theory of violation. (RAB 17-19). This argument is without merit.

We agree with the ALJ that at least in the context of his personal ownership and operation of individual retail stores, as well as in his role as head of Gibson Products Company, Gibson, Sr. was plainly a buyer.

Respondent relies heavily on Nuarc Co. v. FTC, 316 F.2d 576 (7th Cir. 1963), where it was held that under certain circumstances mere ownership may not suffice to make one a buyer within the meaning of the Act, but Nuarc is factually inapposite. In that case the Commission was required to try to establish a link between two corporations to show a pass-through of benefits from one to another. The instant case is substantially different. Purchases from Ray-O-Vac by at least the Gibson, Sr. owned retail operations can be attributed to the actions of Gibson,

Sr. personally. No pass-through of benefits need be demonstrated. Gibson, Sr. is covered by the statutory provision because, as the buyer in the transaction, he or his agent received brokerage payments from the other party to the transaction or from his agent.

Finally, respondent argues that assuming CX 192 represents a brokerage check and assuming that he was a buyer at the time, he has met the statutory exception for "services rendered". (RAB 28-30). It is unclear whether this exception applies as between buyer and seller, although Broch, supra at 173-74, suggests that it may.[25] However, even assuming that buyers may

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[25]"There is no evidence that the buyer rendered any services to the seller or to the respondent [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means
(footnote continued on next page)

avail themselves of it, respondent has not come forward with adequate evidence to substantiate this claim.

Respondent has made no effort in concrete terms to establish the value of the services he rendered in relation to the brokerage payments he received. It is not contested that respondent's services in inducing the purchase of Ray-O-Vac products by Gibson stores were in the nature of brokerage or were "selling type" services within the exception in Section 2(c). But, even assuming this exception is available to buyers, respondent's burden

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(footnote 25 continued)
of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of §2(c) to such circumstances," FTC v. Broch & Co., _supra_ at 173; _but, cf._, Southgate Brokerage Co., Inc. v. FTC, 150 F.2d 607 (4th Cir.), _cert. denied_, 326 U.S. 774 (1945).

is considerably greater and more specific than he contends, and by doing little more than articulating his claim to the exception, he has failed to meet that burden.

Alternatively, several cases suggest the availability in these circumstances of a "functional discount" justification. _See Central Retailer-Owned Grocers, Inc. v. FTC_, 319 F.2d 410 (7th Cir. 1963); _Empire Rayon Yarn Co., Inc. v. American Viscose Corp._, 364 F.2d 491 (2d Cir. 1966) (en banc), _cert. denied_, 385 U.S. 1002 (1967); and _Hruby Distributing Co._, 61 F.T.C. 1437 (1962). Specifically, respondent would have to demonstrate that he performed a valuable service entitling him to a functional discount, the size of which would correspond to the distribution costs the seller saves as a result. _See_

Central Retailer, *supra* at 414; *Empire Rayon*, *supra* at 492.

The analysis that would be undertaken to ascertain whether respondent had proffered an adequate functional discount justification would closely approximate that undertaken to evaluate the "services rendered" by him. The two concepts share a marked similarity, although the focus of each differs slightly, in that the first examines the overall value of respondent's services, while the second fixes upon the savings to the supplier as a consequence of respondent's performance of certain functions the supplier otherwise would have undertaken itself. Arguable, the "services rendered" exception is broad enough to encompass any justification which might be offered under the functional discount rubric, but the ALJ

considered them separately and, for purposes of review, we do likewise.

The ALJ concluded, correctly, that there was no showing here that respondent performed any functions that might have entitled him to a discount of a measurable size. For example, it was not shown that Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Nor was there evidence that Ray-O-Vac was even aware of his activities. As the ALJ noted, this militates strongly against any finding that the split brokerage constituted a functional discount for distributional services. Respondent's appeal, therefore, is denied.

Complaint counsel's appeal is premised exclusively upon the theory that all of

the Gibson respondents constituted a "single economic enterprise," both before and after November 1, 1972. Under this scenario, all respondents should be found liable and placed under order as a consequence of the Barshell transaction, and Al Cohen Associates should be held as a consequence of the transactions in which it was involved, for if all respondents comprised a single enterprise, then Gibson, Sr. must have been a buyer even in 1974 and 1975, when he no longer owned any Gibson retail stores.

To a large extent, we need not address the merits of complaint counsel's appeal. Leaving aside the "single economic enterprise" contention, there is no doubt that before November 1, 1972, all Gibson businesses were at least closely knit. (See discussion <u>supra</u> at p. 18-19). The

Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented.[26] Sunshine Art Studios, Inc.,

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[26]The ALJ found that the liability of respondents H. R. Gibson, Jr. and Gerald Gibson for Section 2(c) violations could not be established, because complaint counsel failed convincingly to tie them to the receipt of illegal brokerage. (ID 202-03). While we do not reverse this (footnote continued on next page)

v. FTC, supra; Delaware Watch Co., Inc. v. FTC, supra.

We are aware that this disposition means that no order will issue against Al Cohen Associates, for we do not address whether a "single economic enterprise" existed after November 1, 1972. In view of the fact that we are binding all of the individual Gibson respondents, however, we do not find this to be a significant omission.

Remedy

A broad order is warranted against all respondents charged in connection with Count II. A substantial question is presented, however, with respect to paragraph 5 of the ALJ's order, which directs respondents to cease and desist from "utilizing franchising or licensing agreements containing (a) provisions

whereunder respondents undertake to give merchandising advice to the licensees or franchisees and (b) provisions whereunder respondents retain the right of quality control over the products sold and services rendered by such licensees or franchisees."

The ALJ found that virtually the only occasions upon which these provisions had been exercised had been to further group boycotts of the type we condemn today. He concluded that, "[i]n view of respondents' insistence that those provisions in the agreement have not been exercised, the imposition of such a provision in the order deprives them of no valuable right." (ID 211)

We are troubled by this provision, because merchandising advice and quality control clauses in franchise agreements

are hardly novel, and they frequently offer legitimate protection to the franchisor's trade name without also serving an anticompetitive purpose. It may indeed be the case that respondent's illegal conduct has been perpetrated under the guise of these clauses, but the remedy may be to restrain the conduct, not the clauses. We are satisfied that an order addressed to conduct, especially as it affects price or concerns suppliers vis-a-vis the trade show, will be adequate to insure that the underlying purpose of the order is not circumvented. We have modified the order to substitute for paragraph 5 of the ALJ's order a more narrow provision focusing on the content of communications from respondents to franchisees. It should, accordingly, be very difficult for respondents to utilize

the merchandising advice and quality control clauses they retain in an anti-competitive manner without thereby violating another provision of the order.

Respondents' additional objections to paragraphs 3 and 4 of the ALJ's order are denied, as these provisions constitute reasonable fencing-in related directly to the conduct held to be illegal in this case. _FTC v. Mandel Brothers, Inc._, 359 U.S. 388 (1959); _FTC v. National Lead Co._, 352 U.S. 419 (1957); _Jacob Siegel Co. v. FTC_, 327 U.S. 608 (1946). Essentially, these provisions prevent respondents from blocking supplier sales to franchisees, either at respondents' whim or, more specifically, because the supplier has not met respondents' terms for participation in the trade show. Thus, these provisions operate to frustrate nascent group

boycotts by preventing respondents from interfering with supplier-franchisee transactions under specified circumstances.

All other objections raised to the order provisions relating to Count II have been considered and are denied.

Gibson, Sr. contends that the order provisions resulting from Count III violations are also overbroad, in that they are not limited to transactions in which he is a buyer, but include those in which he acts as agent or intermediary for a buyer. We see no infirmity in this extension; rather we view it as permissible fencing-in related directly to the conduct held to be illegal herein.

Such fencing-in is particularly appropriate in light of the interrelationship among respondents. At least since November 1, 1972, there has been an

enhanced potential for Gibson, Sr. to act as agent or intermediary for retail stores owned by other members of the Gibson family. Indeed, he owns no stores outright at this time, meaning that, leaving aside the possibility of treating all respondents as a "single enterprise", an order limited to Gibson, Sr.as a buyer might have little practical effect. Finally, it is not true, as Gibson, Sr. suggests, that the ALJ's finding that no liability attached to the Al Cohen transaction constituted a vindication for Gibson, Sr. in those cir-cimstances where he was not a buyer, but merely an agent. The issue of Gibson, Sr.'s agency was not joined, for complaint counsel elected to try the case solely on the theory that Gibson, Sr. was a buyer. The ALJ's finding, therefore does not bear on this question of order coverage.

All other objections raised to the order provisions relating to Count III have been considered and are denied.

Finally, respondents contend generally that no order should be issued, because the evidence is old and the practices found to be unlawful are isolated instances of misconduct. We do not agree. Respondents cannot and do not contend that the law violations were inadvertent or that these practices were voluntarily abandoned, even after issuance of the complaint. Given the nature and structure of their business operation, which remains essentially unchanged, and given the absence of any evidence of abandonment, we find that an order is necessary to combat a cognizable danger of recurrence of the violations.

To promote clarity, we have made numerous stylistic and grammatical changes to the order entered by the ALJ.

April 30, 1980

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Filed: April 30, 1980

COMMISSIONERS:

Michael Pertschuk
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of HERBERT R. GIBSON, SR., et al.	Docket No. 9016

FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondents from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

IT IS ORDERED that the initial decision of the administrative law judge, pages 1-214, as amended, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to Cease and Desist be, and it hereby is, entered:

I.

IT IS ORDERED that respondents Herbert R. Gibson, Sr., individually doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., Gerald Gibson, individually and/or as officers of corporate respondents; and corporate respondents

Gibson's, Inc., Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc. and Gibson Products Co., Inc., their successors and assigns, officers, directors, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the operation of a trade show, the operation or franchising of any retailing business, or the operation of any business related to retailing in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

"1. Combining, agreeing, engaging in an understanding, or conspiring with any of said other respondents, or any other person, partnership or corporation, to

eliminate or boycott any supplier in order to prevent or hinder the supplier's sales to or business dealings with any of the respondents or any other person, partnership, or corporation, provided that nothing herein shall prevent respondents from acting collectively to further legitimate business decisionmaking with respect to businesses, including retail stores, which said respondents own collectively.

2. Coercing or intimidating any supplier in any manner to prevent such supplier from competing for the sale of any products to any retailer or any other person, partnership or corporation.

3. Representing directly or indirectly or implying to any supplier that the supplier may not compete for the sale of any products to any other person, partnership or corporation.

4. Taking any individual action to eliminate a supplier or to prevent or hinder the supplier's sales to or business dealings with any other person, partnership or corporation because such supplier does not appear in shows conducted with the Gibson Trade Show.

5. Recommending, suggesting or advising any retailer or any other person, partnership or corporation not to deal with a supplier because such supplier

does not appear in shows conducted by the Gibson Trade Show, or because such supplier is unwilling to meet the price, delivery, or billing terms demanded by respondent[s] or by any retailer or any other person, partnership or corporation.

II.

IT IS FURTHER ORDERED that Herbert R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Show, Belva Gibson, Herbert R. Gibson, Jr., and Gerald Gibson, Gibson Products Co., Inc., Gibson's, Inc., Gibson's Discount Centers, Inc., their successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary,

division or other device in connection with the purchase of merchandise, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Receiving or accepting, directly or indirectly, as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer, from any seller or seller's broker anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center."

2. Assuming control of or influencing any seller or seller's broker to induce such seller or seller's broker to pay to respondent[s] anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for the account of any retailer using or licensed to use one of respondents' trade names, including "Gibson Discount Center".

III.

IT IS FURTHER ORDERED that Count I of the complaint be, and it hereby is, dismissed.

IV.

IT IS FURTHER ORDERED that Count III

of the complaint be, and it hereby is, dismissed as to respondents Ideal Travel Agency, Inc., Gibson Warehouse, Inc., and Al Cohen Associates, Inc.

V.

IT IS FURTHER ORDERED that, for a period of 10 years from the date of service of this Order, each individual respondent named herein shall promptly notify the Commission of the discontinuance of his or her present business or employment and of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or

employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this Order.

VI.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that respondents herein shall within sixty (60) days after service upon them of this Order file with the Commission a report in writing setting forth in detail the manner and

form in which they have complied with this Order.

By the Commission.

SEAL

/s/Carol M. Thomas
Secretary

ISSUED: April 30, 1980